

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 GLYNN D. AKINS,

5 Plaintiff,

6 -v-

Case No. 10-12755

7 STATE FARM MUTUAL AUTOMOBILE
8 INSURANCE COMPANY,

9 Defendant.

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10 DEFENDANT'S MOTION TO COMPEL DEPOSITIONS, ET AL

11 BEFORE THE HONORABLE MARK A. GOLDSMITH

12 Flint, Michigan, Wednesday, July 27th, 2011.

13

14 APPEARANCES:

15

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1 Flint, Michigan

2 Wednesday, July 27th, 2011.

3 At or about 2:16 p.m.

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5 THE CLERK OF THE COURT: Calling case number
6 10-12755, Akins versus State Farm. Counsel, please
7 state your names for the record.

8 MS. HEINONEN: Good afternoon, your Honor.

9 Stacy Heinonen for the defendant, State Farm.

10 MR. REIFMAN: Benjamin Reifman on behalf of
11 the plaintiff.

12 THE COURT: All right, good afternoon. We
13 have a few motions that are up for hearing today.

14 MS. HEINONEN: Actually your Honor there may
15 be one that we can take out of your pile for today.
16 It's the motion that deals with Dr. Shiener and to
17 enforce the subpoena. Before I left for today's hearing
18 this afternoon, he had delivered his original file to
19 our offices so we're having that copied.

20 THE COURT: All right. So that's resolved?

21 MS. HEINONEN: Yes, your Honor.

22 THE COURT: Okay. I didn't see a response
23 to it so now I think I know why. All right. That was
24 docket 61 so that will be denied as moot. All right,
25 the motions that are still up then are docket 57 which

1 seeks to compel the in-house nurse evaluation, that's by
2 the defendant. Docket 58, also by defendant, seeks to
3 compel depositions of plaintiff and plaintiff's father
4 and certain treaters. Docket 54 is a motion by the
5 plaintiff that seeks certain investigation documents and
6 then we have docket 56 and that's a motion by defendant
7 to seek adjustment to the schedule. Some of these items
8 interrelate. I have reviewed all of the motions and
9 responses so I'm going to give each side five minutes to
10 address these motions and address anything you like.
11 We'll start with the defendant because I think you filed
12 more motions than the plaintiff. Go ahead.

13 MS. HEINONEN: Your Honor, do you prefer
14 that I speak at the podium?

15 THE COURT: No, any place.

16 MS. HEINONEN: Okay. Very briefly. I'll
17 start with the motion for the in-home evaluation by the
18 RN or OT. In this case plaintiff has issues relating to
19 orthopedic injuries sustained in the 2005 accident and
20 he also claims cognitive disabilities arising out of
21 that accident as well. He's currently submitting
22 attendant care calendars claiming approximately between
23 18 and 24 hours of attendant care per day. To what
24 extent that care and the amount of care differentiates
25 between orthopedic injuries and cognitive injuries, we

1 don't really know. We have generic descriptions
2 concerning what may be done in a given month.
3 Nevertheless even if the care is necessitated because of
4 cognitive complaints, reasonable steps can be taken to
5 ensure that Mr. Akins' safety is given full priority and
6 due care, but perhaps without a requirement that
7 somebody be there on a 24-hour basis.

8 There's also an issue in the case with
9 regard to the, what type of attendant care is needed;
10 behavioral intervention versus supervision to keep him
11 out of dangerous situations so to speak. The behavioral
12 intervention claimed by plaintiff requires a hire hourly
13 rate they assert, about 30 dollars per hour versus
14 something less for just general supervision. The
15 in-home evaluation would enable not only to ascertain
16 whether different things could be done to ensure his
17 safety, for example, setting alarms on the doors and
18 windows if there's a concern he may get up and leave the
19 home in the night or, and to ascertain what exactly is
20 done in the home, are there certain circumstances where
21 Mr. Akins may be getting out of control and a care
22 provider really does step in and try to channel his
23 behavior in a different way, what methods are used.
24 Right now we don't know. There's been no recommendation
25 for care based on an observation of what is going on in

1 the home. That hasn't been observed in any fashion. I
2 understand there are concerns with persons the insurance
3 company may select to go in and do this, but we can
4 always seek to have somebody from the Rehabilitation
5 Institute of Michigan from which Mr. Akins obtained
6 treatment very early on which is associated with the
7 Wayne State University.

8 THE COURT: What about the argument that the
9 statute provides it's only for physician examination?

10 MS. HEINONEN: I'm sorry?

11 THE COURT: What about the argument that the
12 statute on provides for physician evaluation?

13 MS. HEINONEN: That's for a medical
14 evaluation. I think that it comes into play in
15 considering that the insurance company is trying, the
16 insurance company is trying to gather information in
17 discovery concerning the treatment that's necessary, the
18 needs that he has as well as under an inspection
19 relating to the premises. This does not --

20 THE COURT: I'm sorry, you said under
21 section what?

22 MS. HEINONEN: Inspection relating to the
23 premises so I believe off the top of my head your Honor,
24 FRCP 34, that deals with inspections.

25 THE COURT: You mean you'd want to just go

1 in there and look at an empty premise?

2 MS. HEINONEN: No, your Honor. We'd like to
3 go into his home and actually observe his activities
4 during the day, but your Honor, this is not an issue
5 that's been directly decided by published authority so
6 it's, but it's an issue that's arisen and at least under
7 the No Fault Statute MCL 500.3159 I believe provides the
8 company with the right to go in and obtain discovery
9 concerning facts about his treatment and his condition
10 and that effectively will follow through with the needs
11 that he may require as a result of this accident.

12 With regard to the other motions that State
13 Farm has filed, your Honor, the motion to extend dates,
14 it's pretty much in conjunction with the motion to
15 compel depositions. We've, umm, since your Honor
16 granted our extension in April, we've been attempting to
17 get the depositions we need on both sides. The
18 difficulty appears to have arisen because our firms are
19 involved in several cases together and the issue that
20 we've been having is many of -- well, all of the
21 communications and dates for depositions are to be
22 scheduled with Mr. Andrews who is insanely busy just as
23 we are, too. I know that his client would like to have
24 him handle the various depositions just as State Farm
25 would like to have Jim Hewson handle the depositions on

1 behalf of the insurer, but that's not always practical
2 or possible so there's -- I'm happy to --

3 THE COURT: Well, you know I already
4 extended these dates once --

5 MS. HEINONEN: Yes, I understand --

6 THE COURT: -- and I understand everybody's
7 busy, I think that's great for your respective law firms
8 that you're fully employed and maybe it's time to hire
9 some more people and spread the enjoyment of practicing
10 law among more lawyers and also keep to your schedules,
11 but you know, I can't keep adjourning schedules just
12 because I have busy lawyers in front of me. I was
13 reasonable in extending this once and then you come in
14 on the very last day of the extended discovery period
15 and you ask me to extend it again and you want to take
16 something like 10-plus depositions or more.

17 MS. HEINONEN: These depositions have all
18 been noticed before and actually your Honor Mr. Andrews
19 and I had discussed perhaps informally extending
20 discovery through August except two problems arose.
21 There's a trial between our offices that will be
22 starting in front of Judge Friedman I believe August
23 15th and there was also a trial that began in the
24 Oakland County Circuit Court in Mer Sears (phonetic).

25 Your Honor, we have on our end, actually we

1 have hired six additional attorneys and we are
2 attempting to get different bodies in to go to these
3 depositions. The trouble is is we've only been able to
4 get dates and schedule with Mr. Andrews' calendar and
5 Mr. Reifman is here. He's a capable attorney as is Mr.
6 Liss and there have been times before where I've been in
7 a deposition with Mr. Liss as well as Mr. Andrews and I
8 do agree that different bodies need to be in place.
9 Your Honor's been very gracious with giving us
10 additional discovery as you did back in April and this
11 time we're not asking that the trial be adjourned, we're
12 asking --

13 THE COURT: You are actually in effect doing
14 that because when you ask me to extend discovery to
15 October 20 and the dispositive motion cut-off to October
16 31 and keep to a settlement conference of December 5,
17 you're setting us up for failure because there's no way
18 I can review your motions and get you opinions in time
19 for your settlement conference so I wouldn't be able to
20 keep to the settlement conference schedule, I wouldn't
21 be able to keep to our final pretrial conference
22 schedule and therefore I wouldn't be able to keep to our
23 trial schedule. So by pushing out the discovery by yet
24 four more months, you're going to end up forcing an
25 adjournment of the critical dates of dispositive motion

1 cut-off, the final pretrial conference, the settlement
2 conference and the trial. I'm not going to do that.

3 MS. HEINONEN: Your Honor, I don't believe
4 that as I look at my motion that I asked for the
5 dispositive motion cut-off to be extended. It was the
6 motion with regard to expert testimony. I believe that
7 the parties have filed whatever dispositive motions that
8 are going to be filed in this case and that includes
9 plaintiff's motion for partial summary judgment which is
10 still pending before the Court. That was filed I
11 believe -- it was filed last year I believe or at the
12 beginning of this year and that was with regard to Renee
13 Laport's (phonetic) bills. So we were asking for the
14 discovery to be extended through October 20th and the
15 motion with regard to limiting or excluding expert
16 testimony to be extended to October 31st.

17 THE COURT: Well, I'm reading from paragraph
18 20 of your motion and it reads rather a request only
19 that fact and expert discovery be extended through
20 October 20, 2011 and that the deadline for filing
21 dispositive motions and motions to limit or exclude
22 expert testimony be extended through October 31, 2011.

23 MS. HEINONEN: Yes, your Honor. My
24 apologies. I overlooked that, but my understanding in
25 preparing for this argument today was just moving the,

1 umm, that we were just going to request that you extend
2 the date for discovery and the date with regard to
3 expert testimony. As I said your Honor, you have been
4 very gracious and we are very appreciative. We have
5 been working with plaintiff's office to get dates for
6 depositions and in fact the depositions of Mr. Akins and
7 Mr. McClain were set to go forward and the very date
8 that they were scheduled to go Mr. Andrews and I were
9 held beyond the time for the deposition in the Oakland
10 County Circuit Court on a case that went to trial in, at
11 the end of May, so --

12 THE COURT: All right. Let's hear from
13 plaintiff's counsel.

14 MS. HEINONEN: Thank you, your Honor.

15 MR. REIFMAN: Good afternoon, your Honor.

16 THE COURT: Afternoon.

17 MR. REIFMAN: My name is Benjamin Reifman.
18 I'm filling in for Mr. Andrews. As you are probably
19 aware, he's out of town.

20 THE COURT: I wasn't aware of that, but,
21 guess he's a busy guy.

22 MR. REIFMAN: So you have to excuse me if
23 I'm not as familiar as I'd like to be with these
24 motions. Additionally this is my first time in Federal
25 Court that's a non-telephonic motion hearing, but I'd

1 like to start with plaintiff's motion unless you'd like
2 me to address the other issues first since we're on top
3 of them?

4 THE COURT: You've got five minutes. Do
5 whatever you'd like to do.

6 MR. REIFMAN: Okay. Plaintiff's motion is
7 in regard, is relative to documents and materials
8 relative to a private investigation done by State Farm's
9 claim adjuster.

10 THE COURT: They say that they don't have
11 any objection to turning over those documents so long as
12 they can depose the plaintiff first.

13 MR. REIFMAN: Correct, but I don't believe
14 that it's proper considering the path of discovery that
15 they've taken. I think they're late in responding to
16 these. They've delayed -- they have a duty to timely
17 supplement disclosures. This material that they've
18 disclosed is at least three months to eight months old.

19 Additionally I don't think that the, that
20 privilege, privileged communications are not intended to
21 be used as a tool to, you know, countermand the rules of
22 discovery and produce things on time. I mean, yeah, I
23 would like to withhold discovery from them, too, until
24 after I depose their witnesses or up until trial. It
25 would be, you know, that's a great idea and I think

1 under Pack (phonetic) and Bayer (phonetic) they discuss
2 a party may not avoid discovery by asserting a privilege
3 and then waive the privilege later so as to present the
4 evidence. I think, you know, it's just simply uncalled
5 for. That's not what privilege is about and I think I
6 discuss in the brief Upjohn v. U.S., the purpose is to
7 encourage full and frank communications in promotion of
8 a broader public interest. Here, they did not produce
9 the documents. They did not let us know the documents
10 existed until we had to send a second set of
11 interrogatories to them asking specifically for these
12 materials even though old interrogatories would have
13 encompassed them. Then all of a sudden they're like oh,
14 here's our privilege log.

15 Additionally, the privilege log is useless.
16 Their privilege log just says investigation and says
17 privilege, investigator, privilege. That doesn't tell
18 us what date it occurred on. Investigative privilege is
19 only for a licensed investigator. We don't even know
20 who the person was who did the investigation. If they
21 don't have a license, then they're not entitled to that
22 privilege. So that's what I have to say on that issue.

23 THE COURT: Okay. Any else?

24 MR. REIFMAN: Well, quite frankly it sounds
25 like, you know, I don't really need to address the other

1 issues other than, umm, their, their motion to compel 10
2 depositions in 30 days is quite frankly egregious. I
3 mean, they know our schedule. They know we have two
4 trials with them in the next 40 days and quite frankly
5 they're trying to, you know, put us in a bind here. I'm
6 offended by it especially considering we didn't oppose
7 their initial motion to extend discovery dates when they
8 did not -- they didn't file one notice for deposition in
9 the first eight months and now they're telling us it's
10 our fault that we didn't comply? I mean, twice they've
11 given us seven to eight deposition notices that were
12 unilaterally scheduled for doctors and for our time
13 without saying anything. How -- that's not reasonable
14 notice. So as far as that's concerned, I think I, I'm
15 offended by that motion especially in light of the
16 history in this case and I absolutely do not want to
17 extend the date of the trial date. I don't think
18 they're entitled to it and I think the rest is in the
19 briefs.

20 THE COURT: All right. Well, let me tell
21 you of my displeasure with the way both sides have been
22 conducting this case. I don't think that either side
23 has been very diligent and I'm very tempted to just
24 leave everybody precisely where they are.

25 I understand everyone have a busy schedule,

1 but I can't keep extending dates because every time I
2 extend dates, I end up penalizing the parties who do
3 keep to schedules because then you as the older case end
4 up leap-frogging on top of newer cases even if they're
5 more diligent. Now that's not fair to those folks and
6 it's not fair to your own clients frankly. I think your
7 clients deserve more attention than what they're
8 getting.

9 I don't think it's appropriate on a last day
10 of a discovery period to file a motion and then seek to
11 compel 10-plus depositions. If one side believes the
12 other side is not cooperating in discovery, it's your
13 obligation to promptly file a motion with the Court so
14 that discovery can be completed within the discovery
15 period. It's not appropriate to wait until the last day
16 of the discovery period, then file a motion to compel
17 and think that you're going to get a sympathetic ear
18 from the Court. It may well be that the nonmoving party
19 hasn't been forth right and forth coming in arranging
20 for depositions, but the moving party needs to be
21 diligent and needs to seek the Court's assistance in
22 compelling discovery promptly and not waiting until the
23 end of the discovery period.

24 At the same time, the Court is mindful that
25 the discovery is an important tool in narrowing issues

1 and discovering the truth and in preparing for trial and
2 so the Court is going to provide some adjustment to the
3 schedule, but not as much as the defendant has
4 requested. First, I'll point out on the record that
5 defendant has orally modified its motion. It is no
6 longer seeking to extend the discovery -- strike that,
7 the dispositive motion cut-off. The attorney for
8 defendant announced that notwithstanding the statement
9 in the written motion, her client is satisfied with the
10 existing dispositive motion cut-off which was July 11.
11 At this point all the defendant is asking for then is an
12 extension of the discovery period, however even that
13 request I think is overly aggressive. It would allow
14 for yet another four months of discovery beyond the
15 extension that the Court granted back in April and I'll
16 point out that we had our first scheduling order back in
17 October of last year and with the input from the
18 attorneys in this case, we had set a schedule only to
19 modify it in April and now I'm being asked to modify it
20 once again. I'm not going to give you that full
21 four-month period to conduct further discovery.

22 You are going to have until the end of
23 August, that will be August 31 to complete the discovery
24 and I understand that it is going to be difficult to
25 complete all of the depositions that have been

1 requested. I think that the defendant has languished
2 far too long in seeking to bring this to the Court's
3 attention, so I'm only going to order the depositions of
4 plaintiff and plaintiff's father and defendant can
5 select two of the treaters to be deposed by the end of
6 August. If the parties want to agree on more
7 depositions than that, that's fine, but I'm not going to
8 be a party to forcing the plaintiff and his treaters to
9 scramble where the defendant has not been diligent. So
10 plaintiff and plaintiff's father and two treaters
11 selected by defendant. That's all I'm going to be
12 ordering to be completed by August 31. The parties can
13 agree if they want to more depositions or to go beyond
14 that date, but I'm not going to order it. I'm doing
15 that based on the fact that I don't believe defendant
16 has been diligent in this case so I'm granting the
17 motion in docket 56 in part and denying it in part. I
18 am granting the motion in docket 58 in part and denying
19 it in part.

20 With respect to the motion in docket 54
21 regarding the investigation documents, I view that
22 really as seeking an order that sets the sequencing of
23 discovery. I don't see it as recognizing necessarily
24 any privilege or waiver of privilege. I think the issue
25 is really much easier than that. It's simply a question

1 of who should have to produce evidence first and I think
2 since the investigation documents should not impact on
3 plaintiff's deposition other than for nefarious reasons,
4 I'm going to order that plaintiff's deposition be taken
5 first and that within seven days of the taking of that
6 deposition, that the so-called investigation documents
7 referenced in docket 54 then be turned over in full.
8 The Court understands the defendant really has no
9 objection to turning over the documents, but simply was
10 concerned about the sequence of the documents.

11 With respect to the in-house nursing
12 evaluation, I'm going to grant that. That's in docket
13 57. I think a review of the premises is reasonable.
14 Even if it's not strictly speaking required under the
15 statute, I nonetheless think it's a helpful piece of
16 information in trying to determine what is the physical
17 state of the plaintiff. I'm going to limit that to no
18 more than three hours. I think that's a reasonable
19 period of time and if there are any conditions that need
20 to be addressed by the Court, you can submit to me a
21 stipulated order if you can agree or if you can't agree,
22 you'll submit rival orders to me. That is to be done
23 within one week from today.

24 MR. REIFMAN: Your Honor, my client has to
25 be evaluated by a nurse and an OT in his own home? Or

1 is it just a blank premise?

2 THE COURT: It was for an in-house nurse
3 evaluation. That's what I --

4 MR. REIFMAN: Yeah, but of my client or of
5 the premises?

6 THE COURT: Both. All right, is there
7 anything else?

8 MS. HEINONEN: One quick question relative
9 to that last motion, your Honor. The in-home
10 evaluation, are you ordering that that be completed by
11 August 31st also?

12 THE COURT: Yes.

13 MS. HEINONEN: Thank you.

14 THE COURT: I want all of this done by
15 August 31st. All right, we will put together an order
16 for you -- yes?

17 MR. REIFMAN: Your Honor, I have several
18 questions about that last part.

19 THE COURT: Okay?

20 MR. REIFMAN: Who are they having -- the
21 rule -- their Rule 26 disclosures have already been put
22 in. They haven't identified who they're having come in
23 and do these evaluations. Who are these experts? I
24 mean, I have all sorts of concerns. First --

25 THE COURT: That's why I said counsel I want

1 you to sit down and work out an order that addresses all
2 the conditions. If you cannot work it out, then you'll
3 each submit to me a proposed order and I'll work it out
4 for you, okay? One week from today.

5 MS. HEINONEN: Thank you, your Honor.

6 THE COURT: All right. Thank you.

7 (Motions concluded at 2:43 p.m.)

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11 I, David B. Yarbrough, Official Court
12 Reporter, do hereby certify that the foregoing pages
13 comprise a true and accurate transcript of the
14 proceedings taken by me in this matter on Wednesday,
15 July 27th, 2011.

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20 July 29th, 2011

/s/ David B. Yarbrough

21 Date

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